65

(2)

No. 07-9

FILED
SEP 4 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CHARLES JOHNSON, GENELDA JOHNSON, FRANCIS VANER JOHNSON, and JOHNSON CRANBERRIES, LLP,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

WILLIAM PERRY PENDLEY
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorney for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether, following *Rapanos v. United States*, courts should apply the plurality's test, the broader test outlined in Justice Kennedy's concurrence, or both tests, to determine the jurisdictional reach of the Clean Water Act?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
IDENTITY AND INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. LEGAL BACKGROUND	4
A. Congress Granted the Corps Limited Authority Under the CWA	4
B. This Court Has Held Consistently that the CWA's Jurisdictional Reach Is Limited by the Constitution and Its Own Terms to Navigable-in-Fact Waters and Waters that Significantly Affect Them	6
1. *United States v. Riverside Bayview Homes, Inc.*	6
2. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*	7
3. *Rapanos v. United States*	9
II. THIS COURT SHOULD GRANT THE *WRIT OF CERTIORARI* BECAUSE, SINCE *RAPANOS*, LOWER COURTS HAVE DETERMINED THE JURISDICTIONAL REACH OF THE CWA INCONSISTENTLY, RESULTING IN A DISPARATE APPLICATION OF THE CWA	11
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Leovy v. United States, 177 U.S. 621 (1900) 4

Marks v. United States, 430 U.S. 188 (1977) 12

Natural Resources Defense Council, Inc. v. Callaway, 392 F.Supp. 685 (D.D.C. 1975) 4, 5

Northern California River Watch v. Healdsburg, 457 F.3d 1023 (9th Cir. 2006) 2, 3, 13, 14

Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994) 14

Rapanos v. United States, ___ U.S. ___, 126 S.Ct. 2208 (2006) ..... *passim*

Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001) 16

San Francisco Baykeeper v. Cargill Salt Div., 481 F.3d 700 (9th Cir. 2007) 11

Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc., 472 F.Supp.2d 219 (D.Conn. 2007) 15

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) ..... *passim*

The Daniel Ball, 77 U.S. 557 (1870) 5

United States v. Chevron Pipe Line Co., 437 F.Supp.2d 605 (N.D.Tex. 2006) 2, 12, 16

United States v. Fabian, ___ F.Supp.2d ___, 2007 WL 1035078 (N.D.Ind. 2007) 3

United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006) 11, 12

TABLE OF AUTHORITIES – Continued

Page

United States v. Johnson, 437 F.3d 157 (1st Cir. 2006), *vacated*, 467 F.3d 56 (1st Cir. 2006) 12, 15

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) ..... *passim*

STATUTES

Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, *et seq.* 4, 5

33 U.S.C. § 401 ..... 4, 5

Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §§ 1251-1387 1

33 U.S.C. § 1251 4

33 U.S.C. § 1251(a) 5

33 U.S.C. § 1251(b) 5

33 U.S.C. § 1252(a) 17

33 U.S.C. § 1362(7) 5, 6

REGULATIONS

33 C.F.R. § 328.3 6

33 C.F.R. § 328.3(a) 6

RULE

Supreme Court Rule 37(6) 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Gregory T. Broderick, *From Migratory Bird to Migratory Molecule*, 30 Colum. J. Envtl. L. 473 (2005) 4

Rina Eisenberg, *Recent Developments in Environmental Law, Clean Water Act*, 20 Tulane Envtl. L.J. 459 (2007) 3

Taylor Romigh, Comment, *The Bright Line of Rapanos: Analyzing The Two-Part Test*, 75 Fordham L. Rev. 3295 (2007) 2

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief on behalf of itself and its members in support of Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a nonprofit, membership, public-interest law firm dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the Clean Water Act[2] ("CWA"), are implemented and enforced in a manner consistent with the Constitution of the United States.

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

[2] Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §§ 1251-1387.

SUMMARY OF THE ARGUMENT

The jurisdictional reach of the CWA has been the source of much litigation. *See, e.g.*, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Rapanos v. United States*, ___ U.S. ___, 126 S.Ct. 2208 (2006). Despite the abundance of litigation, courts have reached widely disparate results when faced with questions of the jurisdictional reach of the CWA. *See, e.g.*, *Northern California River Watch v. Healdsburg*, 457 F.3d 1023 (9th Cir. 2006) (man-made waste pond was under CWA jurisdiction based upon "significant nexus" with Russian River, when hydrological connection was through aquifer); *United States v. Chevron Pipe Line Co.*, 437 F.Supp.2d 605 (N.D.Tex. 2006) (streambed that carried water only during periods of heavy rainfall, and only eventually drained into navigable water, was not within CWA jurisdiction); *see also* Taylor Romigh, Comment, *The Bright Line of Rapanos: Analyzing The Two-Part Test*, 75 Fordham L. Rev. 3295 (2007) (discussing confusion in lower courts about the reach of CWA jurisdiction generally, and the proper application of *Rapanos*, specifically).

Traditionally, this Court has limited the CWA's jurisdictional reach to waters that have some substantial effect on navigable or interstate waters. *SWANCC*, 531 U.S. at 167-168 (discussing *Riverside Bayview*). However, this Court's most recent decision in this area, *Rapanos*, did not command a majority. *Rapanos*, 126 S.Ct. 2208. Further, the "significant nexus" test elaborated by Justice Kennedy in his *Rapanos* concurrence is ambiguous and is applied out of context such that courts appear to conform to his guidance simply by phrasing their decisions in terms of a

"significant nexus" while extending jurisdiction to waters that have, at most, an insubstantial connection to waters of the United States. *United States v. Fabian*, ___ F.Supp.2d ___, 2007 WL 1035078 (N.D.Ind. 2007) (court upheld CWA jurisdiction, based upon the presumption of a significant nexus, over a wetland separated from a ditch by a 15-foot-high, 130-foot-wide levee). These lower court holdings are out of accord with the statute, the Corps's regulations, and the precedent set by this Court; thus, *certiorari* should be granted. Rina Eisenberg, *Recent Developments in Environmental Law, Clean Water Act*, 20 Tulane Envtl. L.J. 459, 467 (2007).

Moreover, the consequence of an overly broad or inconsistent finding of CWA jurisdiction is that landowners who wish to modify the use of their own property may find that to do so, even though not statutorily mandated, the Corps will require that they obtain a federal permit, thus needlessly subjecting them to federal oversight and substantial costs. *See, e.g.*, *Healdsburg*, 457 F.3d at 1030-1032 (court upheld Corps's assertion of jurisdiction over pond based upon hydrological connection, via groundwater, with navigable-in-fact river); *Fabian*, 2007 WL 1035078 (court affirmed the Corps's assertion of jurisdiction over wetlands separated from ditch by 130-foot-wide levee).

———◊———

ARGUMENT

I. LEGAL BACKGROUND.

A. Congress Granted the Corps Limited Authority Under the CWA.

The 1972 Clean Water Act Amendments amended the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, *et seq.*, which was itself an enlargement of the federal control over navigable waters provided by the River and Harbors Act, 33 U.S.C. §§ 401, *et seq.* The previous legislation allowed the Corps to regulate the addition of "pollutants" into navigable waters, including harbors and tidal waterways. Gregory T. Broderick, *From Migratory Bird to Migratory Molecule*, 30 Colum. J. Envtl. L. 473 (2005) (discussing the history of Federal jurisdiction under the CWA and how it was limited to navigable-in-fact waters until *Natural Resources Defense Council, Inc. v. Callaway*, 392 F.Supp. 685 (D.D.C. 1975)). The jurisdictionally limiting phrase "navigable waters of the United States" meant waters upon which "commerce of a substantial and permanent character" was conducted, *i.e.*, navigable-in-fact waters. *Leovy v. United States*, 177 U.S. 621, 632 (1900). The phrase was premised upon the limited constitutional authority granted Congress, "[t]he power of Congress to regulate such waters [was] not expressly granted in the Constitution, but [was] a power incidental to the express 'power to regulate commerce.'" *Id.* The term "pollutants," however, was read broadly to include sand, dirt, and fill material that might obstruct navigation on these waterways. *Id.* at 478.

However, with the CWA, Congress defined "navigable waters," not as "those upon which commerce of a substantial and permanent character is conducted," but as "the

waters of the United States." 33 U.S.C. § 1362(7). Instead of excising the limiting term "navigable waters," Congress chose to broaden it. *SWANCC*, 531 U.S. at 167. Interpretation of "navigable waters" has since been expanded to include "at least *some* waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133 (emphasis added). In order to grant the Corps the power necessary "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," the CWA reached waters beyond the scope of earlier legislation; however, it also recognized the primacy of the states to regulate their own land and water, and must be understood in this context. 33 U.S.C. § 1251(a), (b).

The terms Congress employed had preexisting meaning and have been used by the Corps for over 100 years. *See, e.g.*, *The Daniel Ball*, 77 U.S. 557, 563 (1870). It was not until the United States District Court for the District of Columbia demanded the Corps give the term a broader definition that the Corps began to regulate beyond the traditional "navigable waters." *See Callaway*, 392 F.Supp. at 686 (directing the Corps to draft new regulation consistent with the CWA, and to revoke regulations that placed "limits [on] the permit jurisdiction of the Corps of Engineers by definition or otherwise to other than 'the waters of the United States'"). With regard to other Corps's responsibilities, however, the term "navigable waters" retains its historical meaning. *See, e.g.*, 33 U.S.C. § 401 (mandating that bridges, causeways, and dams on waters that are, or can be, used to transport interstate commerce be approved by the Chief of Engineers).

In response to the decision in *Callaway*, the Corps promulgated regulations that, while broader in reach than

earlier regulations, still retained the primacy of "navigable waters." 33 C.F.R. § 328.3. These regulations use the term "waters of the United States" for efficiency, instead of the term "navigable waters"; however, under the CWA, these two terms are synonymous. 33 U.S.C. § 1362(7). The Corps's regulations provide general categories of water and land that fall within the CWA, and all of the included categories refer recursively either back to waters used in interstate commerce or to their tributaries. 33 C.F.R. § 328.3(a).

B. This Court Has Held Consistently that the CWA's Jurisdictional Reach Is Limited by the Constitution and Its Own Terms to Navigable-in-Fact Waters and Waters that Significantly Affect Them.

On three occasions, this Court has reviewed the Corps's assertion of jurisdiction under the CWA. In the first case, this Court overruled the Sixth Circuit Court of Appeals' overly restrictive holding. *Riverside Bayview*, 474 U.S. at 139. In the next two cases, this Court overruled the Courts of Appeal for the Sixth and Seventh Circuits' acceding to the Corps's overreach. *SWANCC*, 531 U.S. at 174; *Rapanos*, 126 S.Ct. at 2235. In each instance, this Court recognized that the CWA's jurisdiction is limited.

1. *United States v. Riverside Bayview Homes, Inc.*

In the first instance, *Riverside Bayview*, this Court reversed a Sixth Circuit Court of Appeals' decision that exempted a property that was squarely within the Corps's guidelines and the terms of the CWA. 474 U.S. at 135.

This Court held that a wetland adjacent to, and "inseparably bound up" with, a navigable-in-fact river was within the CWA's jurisdiction. *Id.* However, this Court restricted its holding to the facts of that case, stating that it was not addressing whether other waters were within the CWA's jurisdiction. *Id.* at 131. Based upon the language, policies, and history of the CWA, this Court found that the wetlands at issue were "inseparably bound up" with navigable waters and, thus, were within the CWA's jurisdiction. *Id.* at 135-136.

This Court stated that the term "navigable" was of limited import, but nonetheless premised its decision upon the fact that the CWA was intended to cover "at least *some* waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 133 (emphasis added). Implicit in this statement is that regulation of waters that are not, in fact, navigable is the exception and not the rule. Similarly, this Court acknowledged that not all wetlands adjacent to navigable waters would have a "great" effect on those navigable waters. *Id.* at 135. However, this Court held that the basis for including those wetlands in the CWA's jurisdiction was, in the "majority" of cases, that they would have a "great" effect on those waters. *Id.* Even then, this Court justified its categorical inclusion of wetlands adjacent to navigable-in-fact waters based upon the Corps's ability to grant fill permits for wetlands that did not fit the generalization. *Id.*

2. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers.*

This Court reaffirmed the holding of *Riverside Bayview* with its decision in *SWANCC*. The Corps, in *SWANCC*,

denied a fill permit to a solid waste disposal group because the abandoned gravel pit in question purportedly hosted various species of migratory birds, even though the waters were man-made, non-navigable, isolated, intrastate ponds. 531 U.S. at 162. The Corps asserted CWA jurisdiction over any water or wetland, regardless of its relation to navigable waters, based upon the presence of birds that might cross state lines or that might draw tourists from across state lines, using the so called "Migratory Bird Rule." *Id.* at 164.

This Court characterized the relationship between a wetland and adjacent navigable-in-fact waters such that no boundary could be drawn between the two as a "significant nexus." *Id.* at 167. This Court acknowledged that the discussion in *Riverside Bayview* of the term "navigable" being of limited importance could not be conclusive as "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. This Court held that the "Migratory Bird Rule" impermissibly extended CWA jurisdiction based upon the presence of birds that cross state lines. *Id.* at 174. In so doing, this Court held that a pond, remote from any interstate or navigable water, could not be within the CWA's jurisdiction because it lacked the "significant nexus" of the water. *Id.* (citing *Riverside Bayview*). This Court held that such waters were outside the scope of the CWA, and, even if they were not, assertion of federal jurisdiction over waters wholly unrelated to interstate waters would raise serious constitutional concerns. *Id.*

3. *Rapanos v. United States.*

Most recently, building upon the framework of *Riverside Bayview* and *SWANCC*, this Court struck down yet another attempt by the Corps to extend CWA jurisdiction. In *Rapanos*, the Corps asserted jurisdiction over waters with *any* purported hydrological connection to navigable-in-fact waters, *Rapanos*, 126 S.Ct. at 2219; however, this Court overturned and remanded the Sixth Circuit's affirmance of the Corps's jurisdiction over wetlands that were as far as 20 miles from navigable-in-fact waters. *Id.* at 2214. The wetlands at issue were connected to navigable water via drainage ditches over which the Corps had asserted jurisdiction, again based upon a purported hydrological connection, arguing that the drainage ditches were waters of the United States. *Id.* at 2219. This Court also vacated and remanded the companion case, *Carabell v. United States Corps of Engineers*, in which the Corps asserted jurisdiction over a wetland with no surface connection – except during flooding – to an adjacent intermittent ditch. *Id.* This Court refused to uphold the rule that a hydrological connection could, by itself, bring a water body within "waters of the United States." *Id.* at 2235.

Rapanos, however, was a plurality opinion. The plurality concluded that the CWA's jurisdiction "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Id.* at 2225 (brackets and ellipses in original omitted). Moreover, the plurality would find CWA jurisdiction only over wetlands that "ha[ve] a continuous surface connection with that water, making it difficult to

determine where the 'water' ends and the 'wetland' begins." *Id.* at 2227.

Concurring in the judgment, Justice Kennedy would extend CWA jurisdiction to all "wetlands" except those that have only a speculative or insubstantial effect on waters that are more conventionally understood as navigable. *Id.* at 2248 (Kennedy, J., concurring). Under Justice Kennedy's approach, CWA jurisdiction would be presumed where a wetland was adjacent to a navigable-in-fact body of water, regardless of any actual effects of the wetlands on the navigable water. *Id.* at 2249. In addition, Justice Kennedy would allow inclusion of wetlands, if, when aggregated with "similarly situated waters," the effects would be significant. *Id.* at 2248. Justice Kennedy premised this grant of jurisdiction upon the stated goal of the CWA to regulate the biological, chemical, and physical integrity of navigable waters. *Id.* In short, under Justice Kennedy's approach, jurisdiction is premised upon the possible effect that pollution – including dredge and fill material – may have on waters used in interstate commerce. *Id.*

This Court's precedent consistently has retained the limiting term "navigable waters" when examining the jurisdictional reach of the CWA. This Court held that waters that were indistinguishable from navigable waters – in the sense that no boundary could be drawn – fell within the jurisdictional reach of the CWA based upon a connection to, and effect upon, those navigable waters. *Riverside Bayview*, 474 U.S. at 135. In *SWANCC,* this court demanded a retrenchment of the Corps's jurisdiction, one that would exclude land and water wholly unconnected with navigable waters. *SWANCC*, 531 U.S. at 168. Finally, in *Rapanos*, this Court again limited CWA

jurisdiction, requiring more than a mere hydrological connection between the waters sought to be regulated and jurisdictional waters. *Rapanos*, 126 S.Ct. at 2226, 2249.

II. THIS COURT SHOULD GRANT THE *WRIT OF CERTIORARI* BECAUSE, SINCE *RAPANOS*, LOWER COURTS HAVE DETERMINED THE JURISDICTIONAL REACH OF THE CWA INCONSISTENTLY, RESULTING IN A DISPARATE APPLICATION OF THE CWA.

Courts have split as to how to interpret and apply *Rapanos*. *See* Romigh, 75 Fordham L. Rev. at 3306 ("The few cases decided since *Rapanos* illustrate continuing confusion regarding the extent of the Corps's jurisdiction under the CWA."). The result of this split is, as Chief Justice Roberts predicted in *Rapanos*, that jurisdiction is now determined on a case-by-case basis. 126 S.Ct. at 2236 (Roberts, C.J., concurring). Since *Rapanos*, each court faced with a CWA jurisdictional issue has elected to apply either Justice Kennedy's concurrence, both the plurality and Kennedy's concurrence, or, on at least one occasion, neither. Some courts have found jurisdiction based upon the mere adjacency of a wetland to a water of the United States pursuant to Justice Kennedy's approach. *See, e.g.*, *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (remanding case to be decided according to Justice Kennedy's "significant nexus" test, without any reference to limitations based upon *Riverside Bayview*, or *SWANCC*). Some, such as the Ninth Circuit, have examined the relationship between a body of water and the biological, chemical, and physical integrity of navigable waters to establish jurisdiction. *See, e.g.*, *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 708 (9th Cir.

2007) (examining whether the pond in question had any effect on nearby navigable slough to determine a "significant nexus" between the two). Others, such as the First Circuit, have looked to either the Plurality's test or Justice Kennedy's test to establish jurisdiction. *See, e.g.*, *United States v. Johnson*, 437 F.3d 157 (1st Cir. 2006), *vacated*, 467 F.3d 56 (1st Cir. 2006). Yet others have declined to apply *Rapanos* at all. *See, e.g.*, *Chevron Pipe Line Co.*, 437 F.Supp.2d at 605 (declining to apply holding of *Rapanos*, instead applying existing Fifth Circuit precedent).

In *United States v. Gerke Excavating, Inc.*, the Seventh Circuit held that the "significant nexus" test was the narrower test – in terms of limiting the Corps's authority – and hence was the appropriate test to apply. 464 F.3d 723 (citing *Marks v. United States,* 430 U.S. 188 (1977) (when no single opinion commands a majority of the Court, lower courts should look to the narrowest decision)). The court, therefore, remanded the decision with instruction that the district court follow Justice Kennedy's concurrence. *Id.* The Seventh Circuit impliedly assumed that any decision consistent with Justice Kennedy's concurrence would necessarily comport with *SWANCC* and *Riverside Bayview* as well.

Similarly, the Northern District of Indiana followed the lead of the Seventh Circuit in *United States v. Fabian* and upheld CWA jurisdiction by applying Justice Kennedy's concurrence. ___ F.Supp.2d ___, 2007 WL 1035078 (N.D.Ind. 2007). The court held that the defendant had filled a wetland in violation of the CWA. *Id.* at *16. Fabian's wetland, even though separated by a levee 15 feet high and 130 feet wide, nevertheless was considered adjacent to "Burn's Ditch." *Id.* at *13. The court held that this ditch, as shallow as nine inches, was navigable by

canoe, and thus navigable-in-fact for purposes of the CWA. *Id.* at *15. To find jurisdiction, the court determined that Justice Kennedy's concurrence in *Rapanos* was the determinative holding. *Id.* at *14. Because Justice Kennedy would presume the presence of a "significant nexus" whenever a wetland was adjacent to a navigable body of water, the court did not address whether a "significant nexus" actually existed; instead, the court concluded that the wetland was a "water of the United States." *Id.* at *13. Like Justice Kennedy in *Rapanos*, the court simply assumed that a wetland geographically near a body of "water" is not isolated, and thus had a significant effect on navigable waters. Therefore, the court held that the Corps was justified in regulating the property. *Id.* at *15.

The Court of Appeals for the Ninth Circuit, in contrast, has applied a modified version of Justice Kennedy's test to determine CWA jurisdiction. *Healdsburg*, 457 F.3d at 1029. Despite that the man-made pond in question and a navigable-in-fact river were adjacent – separated by a levee as little as 50 feet wide in places and would therefore be presumed to have a "significant nexus" according to Justice Kennedy – the court examined whether the pond significantly affected the chemical integrity of the adjacent river. *Id.* at 1030. The court examined not just the effects that the pond might have on the Russian River, but also examined the effect of the pond in conjunction with that of nearby wetlands. *Id.* at 1026. The court held, because the Corps showed that water from the pond seeped into the River, there was a significant nexus. *Id.* at 1031. The nexus between the pond and the river, though, was primarily due to groundwater seepage and only occasionally

due to breaches in the levee during flooding.[3] *Id.* Despite the reliance on non-jurisdictional waters – groundwater – the court looked to the *actual* effect of the water in question and a navigable-in-fact river and did not just assume a "significant nexus." Thus, the Ninth Circuit found jurisdiction based upon a test that is neither true to Justice Kennedy's concurrence in *Rapanos*, nor consistent with precedent excluding groundwater from the CWA's reach.

The Ninth Circuit later applied the same modified version of Justice Kennedy's test when an environmental group attempted to force the Corps to exercise jurisdiction over a wastewater pond near a navigable slough that emptied into San Francisco Bay. *San Francisco Baykeeper*, 481 F.3d 704-710. The man-made wastewater pond in question was separated from a navigable-in-fact slough, a tributary of San Francisco Bay, by a levee. *Id.* at 702. The Corps failed to show that water from the pond ever entered the slough. *Id.* at 705. As in *Healdsburg*, the court refused to presume a "significant nexus" based upon mere adjacency. Accordingly, the Ninth Circuit held that the pond was not within CWA jurisdiction because the connection between the pond and the slough was, at best, speculative. *Id.* at 708.

Yet other courts have adopted Justice Stevens's suggestion, in his dissenting opinion in *Rapanos*, and have

---

[3] Courts have held consistently that groundwater falls outside of the CWA's jurisdiction. *See, e.g., Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965-966 (7th Cir. 1994) (rejecting CWA jurisdiction over an artificial retention pond with only a groundwater connection to other waters because "[n]either the Clean Water Act nor the EPA's definition asserts authority over groundwaters").

examined both the plurality's and Justice Kennedy's tests to determine CWA jurisdiction. *Rapanos*, 126 S.Ct. at 2264-2265 (Stevens, J., dissenting). However, unlike the Ninth Circuit in *Healdsburg*, these courts do not require a showing of both adjacency and a "significant nexus." *See, e.g.*, *Johnson*, 467 F.3d at 57. In the case at bar, for example, the First Circuit examined how other courts have applied *Rapanos*. *Johnson*, 467 F.3d at 60-62. The court concluded that the best method to determine CWA jurisdiction would be – as per Justice Steven's *Rapanos* dissent – to find jurisdiction whenever a majority of this Court might find jurisdiction proper. *Id.* at 65. The court went on to remand the case to be decided according to either the plurality's test or Justice Kennedy's "significant nexus" test. *Id.* at 57. The court held that jurisdiction could be based upon either test because, under either test, the four *Rapanos* dissenting Justices would likely find jurisdiction proper, thus resulting in a majority of this Court finding jurisdiction. *Id.* at 65.

The District Court for the District of Connecticut, examining *Johnson*, held that the First Circuit's application of either test for CWA jurisdiction was a reasoned approach. *Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.*, 472 F.Supp.2d 219 (D.Conn. 2007). The court held that the wetland on the defendant's property was near, but not adjacent to, a navigable-in-fact river, thus a "significant nexus" could not be presumed. The court also held that, because the plaintiffs failed to show that the defendant had caused lead contamination into the adjacent navigable river, no "significant nexus" between the two existed. *Id.* at 230. Thus, jurisdiction was lacking under Justice Kennedy's test. *Id.* Moreover, the court also

held that, because there was no continuous surface connection between the wetlands in question and the adjacent navigable river, CWA jurisdiction was also lacking under the plurality's test. *Id.* at 229. Because neither *Rapanos* test was satisfied, the court held that the wetland in question was outside the jurisdiction of the CWA. *Id.* at 229-230.

Standing in stark contrast to the approaches of other courts is that of the Northern District of Texas. In *United States v. Chevron Pipe Line Co.*, the court declined to apply either of the tests outlined in *Rapanos*. 437 F.Supp.2d 605 (N.D.Tex. 2006). The court implicitly accepted that Justice Kennedy's concurrence was controlling, but held that the "significant nexus" test was too ambiguous to apply to the case before it. *Id.* at 613-614 ("This test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is 'significant' and how is a 'nexus' determined?"). Instead, following Chief Justice Robert's concurrence, the court applied its pre-*Rapanos* precedent to determine the scope of the CWA. *Id.* The Fifth Circuit, in cases decided prior to *Rapanos*, interpreted this Court's CWA precedent strictly, denying CWA jurisdiction where waters were only intermittently connected to navigable waters. *See, e.g.*, *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) (declining CWA jurisdiction based upon oil leaks onto dry land, intermittent streams, and groundwater). The court applied this pre-*Rapanos* precedent to find jurisdiction lacking.

In summary, the Seventh Circuit and the Northern District of Indiana have applied Justice Kennedy's concurrence to determine CWA jurisdiction after *Rapanos*. The

Ninth Circuit applies a modified version of Justice Kennedy's test, requiring the presence of adjacency and a "significant nexus" to establish CWA jurisdiction. The First Circuit and the District of Connecticut have followed Justice Steven's *Rapanos* dissent and apply either Justice Kennedy's test or that of the plurality to establish jurisdiction under the premise that the four dissenting Justices in *Rapanos* would concede jurisdiction when either of the other two tests are satisfied. Finally, the Northern District of Texas continues to apply the pre-*Rapanos* precedent of the Fifth Circuit to determine CWA jurisdiction.

CONCLUSION

The CWA was meant to be a comprehensive, uniform means of addressing water pollution nationally. 33 U.S.C. § 1252(a). Nonetheless, as a result of the Corps's practices and the courts' erratic application of this Court's precedent, we have a fractious, unpredictable law. Jurisdictional determinations vary by court: it may be found over waters hundreds of miles removed from any navigable water, yet may be denied over waters a few hundred feet removed from a major navigable thoroughfare. While groundwater is exempted from CWA regulation, a groundwater connection has been used as a basis for finding a "significant nexus" and thus CWA jurisdiction. Moreover, the application of *Rapanos*, in conjunction with *Riverside Bayview* and *SWANCC*, varies by court. Absent a decision by this Court, the Corps will continue to regulate without meaningful oversight. Lower courts will continue to apply this Court's ruling in *Rapanos* in an irregular manner, utilizing different tests on a case-by-case, circuit-by-circuit

basis. This Court should grant *certiorari* in order to clarify the reach of the CWA.

Respectfully submitted,

WILLIAM PERRY PENDLEY
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorney for Amicus Curiae

September 4, 2007